ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
SARAH J. HEFFLEY, JUDGE

DIVISION I

CACR 06-603

REINHARD SCHUMANN

January 31, 2007

APPELLANT

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
[NO. CR-04-222]

V.

STATE OF ARKANSAS

HONORABLE HAROLD S. ERWIN, JUDGE

APPELLEE

AFFIRMED

Sarah J. Heffley, Judge

Appellant was found guilty by a Jackson County jury of second-degree unlawful discharge of a firearm from a vehicle, a class B felony. As a result, he was fined $15,000 and assessed court costs and fees, and the court entered a permanent no-contact order barring him from being within two hundred yards of Arno Schumann and his family. Appellant's only argument on appeal is that it was error for the trial court to refuse an instruction on third-degree assault as a lesser-included offense. We affirm.

The testimony at trial revealed that on December 25, 2004, appellant phoned the house

of his brother, Arno Schumann. Arno's son, Brandon, answered the phone. Brandon testified that appellant wished him Merry Christmas and then told him that he was going to kill his dad. Brandon hung up the phone and told his mom and dad what appellant had said.

Sheila Schumann, Arno's wife, testified that two days later on December 27, after it was dark, she was at home when she saw headlights shining into the living room. She said she heard shots being fired and someone hollering. She and her husband Arno both jumped up, and Arno went to the front door. Arno looked out the front door and told Sheila that his brother was outside and that she needed to "hit the floor." At that time, Arno ran to the bedroom and got his rifle, and Sheila called 9-1-1. Sheila testified she was scared to death, because her husband was at the front door firing at his brother's car in the driveway, and she was afraid he was going to be shot.

Arno Schumann testified that when he heard gunshots on December 27, he looked outside from his front door and saw his brother, appellant, sitting in a Cadillac Escalade in his driveway. He said appellant was firing a gun with his right hand and that he could hear the ricochet of bullets as they hit his house. Photographs of the chipped brick on Arno Schumann's home were entered into evidence. Arno testified that he fired his rifle three times at the engine of appellant's vehicle, because he was attempting to prevent him from leaving. He explained that he did not want appellant to leave because appellant had called his house numerous times to threaten his life. Arno reported these threats to law enforcement, but they told him they could not do anything to assist until appellant actually

did something to him.

Appellant testified at the trial. He did not deny that he called his brother's house and told Brandon he was going to kill Arno. According to appellant, however, the phrase "I'll kill his a**" was just a figure of speech that was not intended to be a threat. Appellant further testified that he went to his brother's home on December 27 with the intention of talking to him. He said that he fired a gun into the air seven times as a way of announcing his presence so that his brother would come outside to talk to him. Appellant said he could not believe his brother shot back at him. After his brother shot at his vehicle, appellant drove to the police department to report his brother and the damage to his vehicle.

The prosecuting attorney initially charged appellant with aggravated assault, a Class D felony. Approximately five weeks before trial, the prosecuting attorney filed an amended information charging appellant with second-degree unlawful discharge of a firearm from a vehicle, a Class B felony. At trial, appellant requested an instruction on third-degree assault as a lesser-included offense. Assault in the third degree is a Class C misdemeanor. The trial court declined to give the requested instruction on the basis that it was not a lesser-included offense of the one charged. We agree.

Whether an offense is included in another offense is determined by application of Ark. Code Ann. § 5-1-110(b) (Repl. 2006), which provides:

> (b) A defendant may be convicted of one (1) offense included in another offense with which he or she is charged. An offense is included in an offense charged if the offense:
>
> (1) Is established by proof of the same or less than all of the elements

required to establish the commission of the offense charged;

(2) Consists of an attempt to commit the offense charged or to commit an offense otherwise included within the offense charged; or

(3) Differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish the offense's commission.

See also Gaines v. State, 354 Ark. 89, 118 S.W.3d 102 (2003). Appellant's proffered instruction does not meet any of the three alternative tests set out in Ark. Code Ann. § 5-1-110(b). *See McCoy v. State*, 347 Ark. 913, 69 S.W.3d 430 (2002).

A person commits the offense of unlawful discharge of a firearm from a vehicle in the second degree if he recklessly discharges a firearm from a vehicle in a manner that creates a substantial risk of physical injury to another person or property damage to a home, residence or other occupiable structure. Ark. Code Ann. § 5-74-107 (Repl. 2005). A person commits assault in the third degree if he purposely creates apprehension of imminent physical injury in another person. Ark. Code Ann. § 5-13-207(a) (Repl. 2006).

In applying the alternative tests provided in Ark. Code Ann. § 5-1-110(b), we can summarily dispose of (b)(2), because assault in the third degree is not an attempt offense. We are left to determine whether assault in the third degree is established by proof of the same or less than all of the elements required to establish the offense of unlawful discharge of a firearm from a vehicle pursuant to § 5-1-110(b)(1) or, pursuant to (b)(3), whether it differs from the unlawful discharge of a firearm from a vehicle only in the respect that a less serious injury or risk of injury to the same person, property, or public interest or a lesser kind of culpable mental state suffices to establish its commission.

The offense with which appellant was charged requires proof that the defendant discharged a firearm from a vehicle and, in doing so, created a substantial risk of injury to a person or property. It does not contemplate the state of mind of the victim. Conversely, the offense designated in appellant's proffered instruction requires proof that the defendant created apprehension of imminent physical injury in another person. This offense does not contemplate actual risk of injury or damage, but rather the fear of such. In other words, the former offense deals with creating a risk of injury to person or property, while the latter deals with affecting the state of mind of the victim. Thus, assault in the third degree cannot be established by proof of the same or less than all the elements required to prove unlawful discharge of a firearm from a vehicle, nor can it be said to differ only in that a less serious injury or risk of injury will establish its commission.

Furthermore, the offense of unlawful discharge of a firearm from a vehicle requires only a showing of a reckless mental state, whereas assault in the third degree requires a purposeful mental state. Ark. Code Ann. § 5-1-110(b)(3) provides that an offense may be a lesser-included offense if it requires a *lesser* culpable mental state, not a greater one, which is the situation presented here.

Applying the analysis found in Ark. Code Ann. § 5-1-110(b), assault in the third degree is not a lesser-included offense of the unlawful discharge of a firearm from a vehicle. A trial court's refusal to submit a requested jury instruction will not be reversed absent an abuse of discretion, *Cook v. State*, 77 Ark. App. 20, 73 S.W.3d 1 (2002), and, when the

requested jury instruction is not a lesser-included offense, it follows that the trial court's refusal to give it is not an abuse of discretion. *Hill v. State*, 344 Ark. 216, 40 S.W.3d 751 (2001), *rev'd on other grounds, McCoy v. State,* 347 Ark. 913, 69 S.W.3d 430 (2002). Thus, the trial court did not err in refusing to instruct the jury on assault in the third degree. *See Gaines v. State*, 354 Ark. 89, 118 S.W.3d 102 (2003).

Affirmed.

HART and MARSHALL, JJ., agree.